NO. 48901-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

BILLY CHARLES BROWN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-02522-8

BRIEF OF RESPONDENT

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II. The evidence was sufficient to prove that the victim's fear the threat would be carried out was reasonable.

STATEMENT OF THE CASE

On December 17, 2015, Billy Brown, a convicted felon and sex offender, met with his community corrections officer, Bethany Clemons. CP 4-5, RP 7, 12. On his November check-in a month prior to this meeting, methamphetamine was found in Brown's urine sample. RP 13. During this December 17th meeting, Ms. Clemons requested that Brown submit to urinalysis, based on his prior dirty UA and because random urinalysis testing is important to the monitoring program. CP 5, RP 13. Upon learning he would be asked to prove a urine sample Brown became agitated. RP 12. Brown said he didn't want to provide a urine sample, and would rather go to jail than provide one. CP 5, 12. Brown became "very upset" when he was placed in handcuffs for the transport to jail and was "obviously agitated." RP 14. Upon arriving at the jail Brown asked to

meet with a mental health counselor. CP 5. Brown met with Mental Health Coordinator Virginia Walker. CP 5.

Ms. Walker met with Brown at the jail. RP 28. Brown was "quite upset," and reported having mental health issues for which he was not taking medication. RP 28. Brown mentioned his probation officer and was "very, very angry at her." RP 29. Brown said that Ms. Clemons was difficult to work with and made too many demands on him, and Brown didn't like her or feel he could work with her. RP 30. Brown told Ms. Walker he was going to kill Ms. Clemons. RP 31. Specifically, Brown said he was mad that Ms. Clemons had "put him back in jail," feeling it was unfair. RP 31. Brown said that he might kill both himself and Ms. Clemons. RP 31. Ms. Walker said the threat "concerned me because of how angry and how agitated he was at the time." RP 31. Ms. Walker immediately reported the threat. RP 32. On cross-examination Ms. Walker was presented with her written statement, in which she wrote that Brown said he would "hurt" Ms. Clemons, likely not realizing the legal significance of "hurt" versus "kill." RP 37-38. However, she maintained that Brown threatened to kill Clemons. RP 39. Because threatening a criminal justice participant does not require a threat to kill to elevate the

crime to a felony, this distinction was immaterial to the finder of fact.[1] CP 6.

Approximately thirty minutes to one hour after Brown left his meeting with Clemons, Clemons was notified by her supervisor that while at the jail, Brown threatened to kill her. RP 16. Specifically, she was notified that Brown said if she continued to monitor him in the way she had been doing, he felt it would result in him going to prison and he threatened to kill her in response. RP 16. Ms. Clemons feared that Brown would carry out his threat, based on his history of non-compliance with his probation and the fact that she had been forced to request warrants on him, his criminal history which included previous assaults, obstructing a law enforcement officer, and resisting arrest, his methamphetamine use, and his agitated behavior that day. RP 16-17, CP 6. Ms. Clemons testified that irrespective whether the threat made against her had been a threat to kill or a threat to inflict bodily harm, she feared he would act on his threat and had the ability and intent to both inflict bodily harm and kill her. RP 23-25.

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[1] At pages 76-77 of the VRP, the trial court appears confused by what the defendant was charged with. The State charged the defendant with harassment only under the criminal justice participant prong of the statute, not the threat to kill prong of the statute. It was unnecessary for the trial court to say that he could not find beyond a reasonable doubt that a threat to kill was made, when the State never alleged that a threat to kill was made in the Information. CP 3. To the extent the trial court appeared to believe that Brown was charged under *both* prongs, the trial court was incorrect.

The State charged Brown with felony harassment by threatening a criminal justice participant, who was performing her official duties, with bodily injury. CP 3. Following a non-jury trial, Brown was convicted. CP 4-6. This timely appeal followed.

ARGUMENT

I. The evidence was sufficient to prove that the victim reasonably feared that the specific threat made would be carried out.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency

of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

"Criminal intent may be inferred from circumstantial evidence or from conduct, where the intent is plainly indicated as a matter of logical probability." *State v. Billups*, 62 Wn.App. 122, 126, 813 P.2d 149 (1991), citing *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) and *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013).

The appellate court's role does not include substituting its judgment for the jury's by reweighing the credibility of witnesses or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "'It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable jury could come to this conclusion.'" *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1358 (9th Cir. 1993) (overruled in part on other grounds by *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998), (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)).

The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best

position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

Relying entirely on *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003), Brown argues that where a threat to inflict bodily injury is made, but the recipient of the threat fears that the person who made the threat intends to kill her—rather than merely do bodily injury—, the evidence is necessarily insufficient to sustain a conviction for harassment. That is, that the threat issued must match the harm feared, such that if a threat to inflict bodily harm is made and the victim actually fears the actor will kill him/her, the State cannot obtain a conviction on either felony or gross misdemeanor harassment because a conviction could only lie if the victim feared bodily injury.

Brown is incorrect. The Supreme Court, in *C.G.*, clarified that where the State seeks a conviction on the higher crime of harassment based on a threat to kill, which elevates the gross misdemeanor crime of harassment to a felony, it is not enough that the recipient of the threat merely fear that the actor will inflict bodily injury. Rather, the victim must fear that the actor will carry out the threat to kill. *C.G.* at 609. If the victim merely fears the infliction of bodily injury, and that fear is reasonable, then the most a defendant may be convicted of is gross misdemeanor

harassment, even if the threat that gave rise to the fear of bodily injury was a threat to kill. *C.G* at 611.

Brown's interpretation of *C.G.* is belied by its language. The Court noted in *C.G.* that a threat to kill necessarily includes a threat to do bodily harm. *C.G.* at 611. Thus, if one reasonably fears she is going to be killed, she also reasonably fears that she may receive bodily injury. Brown focuses entirely on this singular passage from *C.G.*: "Whatever the threat, whether listed in subsection (1)(a) or a threat to kill as stated in subsection (2)(b), the State must prove that the victim was placed in reasonable fear that the same threat, i.e., 'the' threat, would be carried out." *C.G* at 609. But Brown takes this passage out of context. Later in the opinion, the Court explained that its holding should not be viewed as requiring that the reasonable fear experienced must literally match the threat issued. *C.G.* at 611.

Brown's argument is further undermined by the reasoning of the Court of Appeals in the unpublished *State v. Adan*, 193 Wn.App. 1042, Slip Op. 73544-6-I (May 2, 2016), which this Court may consider as nonbinding persuasive authority under GR 14. In that case, the defendant similarly argued that where the threat made was found to be a threat to do bodily harm rather than a threat to kill, the evidence was insufficient to

sustain the conviction where the victim feared that defendant would kill her. The Court rejected this claim, stating

> A threat to kill undoubtedly includes the lesser threat to inflict bodily injury. And fear of the threat to kill would similarly include fear of bodily injury. The Supreme Court anticipated this very circumstance when it said that the State might charge a defendant who threatens to kill "with threatening to inflict bodily injury, in the nature of a lesser included offense." Thus, *C.G.* provides no support for Adan's argument.

State v. Adan, 193 Wash.App. 1042, No. 73544-6-I, Slip Op. at 13 (2016),

The State asks this Court to adopt the reasoning of the Court of Appeals, Division One, in *Adan* and hold that where the victim in this case testified that she feared the defendant would carry out a threat to kill, she necessarily also feared that the defendant would carry out a threat to inflict bodily injury. The evidence is sufficient to find the victim reasonably feared the threat would be carried out.

Finally, the victim here *did* fear the defendant would carry out his threat of bodily harm. RP 24. Brown argues this Court cannot consider the victim's testimony that she feared Brown would carry out a threat to do bodily harm to her because it was "hypothetical." This argument is meritless. The testimony in question was not "hypothetical." The victim was asked whether she feared both that Brown would kill her or would inflict bodily harm on her and she answered yes—that she feared both. There is no basis on which to argue this; the Court cannot consider that

testimony in determining whether a rational finder of fact could find the victim reasonably feared the defendant would inflict bodily injury on her. It must be remembered that the State accused Brown of making a threat to do bodily injury immediately or in the future (see RCW 9A.46.020 (1) (a) (i)) against a *criminal justice participant*. CP 3. The trier of fact did not need to find a threat to kill (coupled with reasonable fear that the threat to kill would be carried out) in order to find Brown guilty of a felony in this case. The trier of fact needed only to find that a gross misdemeanor-level threat was made against a criminal justice participant during the performance of her official duties.

The evidence is sufficient to sustain the trial court's finding that the victim reasonably feared the threat to do bodily harm would be carried out.

II. The evidence was sufficient to prove that the victim's fear the threat would be carried out was reasonable.

Brown further claims the evidence is insufficient to sustain the trial court's finding that Brown, by words or conduct, placed the victim in reasonable fear the threat would be carried out. Brown argues that there were no words or conduct, apart from the threat itself, which could have placed the victim in reasonable fear the threat would be carried out. Brown's argument is meritless. The State incorporates its citation to case

law and argument regarding sufficiency of the evidence from section I. Additionally, with respect to the crime of harassment, the Court of Appeals stated the standard of review in *State v. Alvarez*, 74 Wn.App. 250, 260-61, 872 P.2d 1123 (1994): "Assuming the evidence establishes the victim's subjective fear, the issue is whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found beyond a reasonable doubt, using an objective standard, that the victim's fear in each case was reasonable."

Ms. Clemons testified that when she met with Brown on December 17th, 2015, about an hour prior to the threat, he was irritated, frustrated, and agitated. In sum, Brown was very upset with her, even before she was forced to have him booked into jail. It was reasonable for her to assume he would be even more upset at having been booked. She was also aware, by virtue of the reason she and Brown were interacting in the first place, that he was a convicted felon and a user of methamphetamine. Finally, Ms. Clemons was aware of Brown's criminal history which included assaults. These additional facts are more than sufficient to establish that Ms. Clemons had a reasonable fear that the threat would be carried out.[2]

Brown acknowledges this additional evidence, but makes the novel argument that the victim's knowledge of a defendant's prior conduct, to

[2] Brown makes no claim that the fear experienced by Ms. Clemons was not a fear that a reasonable criminal justice participant would have under all the circumstances.

include criminal conduct, cannot be taken into account by the victim when she determines whether she is in fear that a threat will be carried out. Brown cites to no authority for this claim, and the case law does not support it. In *State v. Mills*, 154 Wn.2d 1, 12, 109 P.3d 415 (2005), reasonable fear on the part of the victim was found where the victim was aware that the defendant had been convicted of assaulting another woman who dated her (Mills') ex-boyfriend. It is nonsensical to suggest that a victim's knowledge about a defendant's prior felonious misconduct cannot be taken into account by the victim. Brown essentially argues—again, without citation to authority—that the "words or conduct" must be *contemporaneous* to the threat, and cannot precede it. Without citation to authority, this Court should disregard this argument. *State v. Cox*, 109 Wn.App. 937, 943, 38 P.3d 371 (2002).

Brown also argues that Brown's "pre-threat" behavior cannot be taken into account by the trier of fact in assessing whether Ms. Clemons' fear was reasonable. That is, Ms. Clemons' testimony about Brown's agitated state at being asked to provide a urine sample and in being handcuffed and transported to jail cannot be considered in the reasonable fear calculus. Brown cites no authority for this specious argument. As Brown correctly notes, the statute requires evidence of words or conduct, apart from the threat, that would lead to a person to reasonably fear that

the threat will be carried out. What "words or conduct" count if the behavior of the defendant immediately preceding the threat does not count? Brown couples this argument with a claim that because the defendant didn't act overtly violent in his highly agitated interaction with Ms. Clemons on December 17, 2015, Ms. Clemons could not have been in reasonable fear he would carry out his threat. Again, Brown cites no authority for his novel claim that the threat must be accompanied by overtly violent behavior in order for the victim to experience reasonable fear the threat would be carried out. This argument lacks merit.

Finally, Brown claims that the trial court's conclusion of law number four is insufficient to sustain the conviction because the trial court's conclusion omits the words "by words or conduct." Brown argues that the repetition of this statutory language is a precondition to this Court finding the evidence sufficient to sustain the conviction. Brown is incorrect. First, this Court reviews the record of the proceedings and the findings of fact by the trial court de novo to determine whether any rational trier of fact, taking the evidence in the light most favorable to the State, could have found the essential elements beyond a reasonable doubt. The report of proceedings coupled with the trial court's findings of fact are more than sufficient to sustain Brown's conviction. Second, by stating "a reasonable criminal justice participant would have been in fear of

Defendant's threat under all the circumstances presented," the trial court was effectively saying that Brown had, by words or conduct, placed Ms. Clemons in reasonable fear that the threat would be carried out. "By words or conduct" is a component of the reasonable fear element. Brown cites no authority holding that such a conclusion of law must contain language mirroring each word in the statute. This argument fails. The evidence is sufficient to sustain the conviction.

CONCLUSION

The State respectfully asks this Court to affirm the conviction.

DATED this 4th day of October 2016.

Respectfully submitted:

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APPENDIX A

RCW 9A.46.020 HARASSMENT

(1) A person is guilty of harassment if:
(a) Without lawful authority, the person knowingly threatens:
(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
(ii) To cause physical damage to the property of a person other than the actor; or
(iii) To subject the person threatened or any other person to physical confinement or restraint; or
(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.
(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.
(b) A person who harasses another is guilty of a class C felony if any of the following apply: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person; (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or (iv) the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties. For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.
(3) Any criminal justice participant who is a target for threats or harassment prohibited under subsection (2)(b)(iii) or (iv) of this section, and any family members residing with him or her, shall be eligible for the address confidentiality program created under RCW 40.24.030.
(4) For purposes of this section, a criminal justice participant includes any (a) federal, state, or local law enforcement agency employee; (b) federal, state, or local prosecuting attorney or deputy prosecuting attorney; (c) staff member of any adult corrections institution or local adult detention facility; (d) staff member of any juvenile corrections institution or local juvenile detention facility; (e) community corrections officer, probation, or parole officer; (f) member of the indeterminate sentence review board; (g) advocate from a crime victim/witness program; or (h) defense attorney.
(5) The penalties provided in this section for harassment do not preclude the victim from seeking any other remedy otherwise available under law.

CLARK COUNTY PROSECUTOR

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